TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 646

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

JAMES Q. NEWTON, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 23, 1941
CERTIORARI GRANTED MARCH 9, 1942

UNITED STATES CIRCUIT COURT OF APPEALS
TENTH CIRCUIT

No. 2267

COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

vs.

JAMES Q. NEWTON, JR., RESPONDENT.

[Petitioner's Designation of Record.]

Robert B. Cartwright, Clerk,
U. S. Circuit Court of Appeals
for the Tenth Circuit,
Denver Colorado.

Sir:

Further reference is made to your letters of February 11, 1941, acknowledging receipt of transcript of record in the above entitled proceedings upon petitions for review by the Commissioner of Internal Revenue, and to our telegram of February 17, 1941, designating the portion of the records in the two cases for printing.

* * * * * *

Also that in Commissioner v. James Q. Newton, Jr., No. 2267, a separate record be printed and that the transcript of record as filed be printed including the stipulation of facts but excluding the exhibits.

Respectfully

For the Attorney General,
SAMUEL O. CLARK, JR.,
Assistant Attorney General.

Filed February 19, 1941, Robert B. Cartwright, Clerk.

UNITED STATES BOARD OF TAX APPEALS.

JAMES Q. NEWTON, JR., PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Docket No. 97325.

Appearances—For Petitioner: Richard M. Davis, Esq., Quigg Newton Jr., Esq., For Respondent: A. R. Shannon, Jr., Esq., Carroll Walker, Esq.

Docket Entries:

1939

Mar. 2—Petition received and filed. Taxpayer notified. (Fee paid.)

Mar. 2—Copy of petition served on General Counsel.

Apr. 18—Answer filed by General Counsel.

Apr. 18—Request for Circuit hearing in Denver, Colorado, filed by General Counsel.

Apr. 26—Notice issued placing proceeding on Denver, Colorado Calendar. Answer and request served.

July 28—Hearing set September 18, 1939, in Denver, Colorado.

Sept. 21—Hearing had before Miss Harron on merits. Stipulation of facts filed. Consolidated for hearing with docket 97324. Petitioner's brief due 11/6/39—respondent's brief due 12/6/39—reply due 12/21/39.

Oct. 9—Transcript of hearing Sept. 21, 1939 filed.

Nov. 6—Brief filed by taxpayer. 11/6/39 copy served.

Nov. 27—Motion for extension to Jan. 6, 1940 to file brief filed by General Counsel. 11/28/39 granted and petitioner's reply due Feb. 6, 1940.

1940

Jan. 5—Motion for extension to 1/22/40 to file brief filed by General Counsel. 1/6/40 granted—petitioner's reply due February 21, 1940.

Jan. 24—Motion for leave to file attached brief filed by General Counsel. 1/25/40 granted.

Feb. 5—Motion for extension to March 25, 1940 to file reply brief filed by taxpayer.

Mar. 11—Motion for leave to file the attached reply brief filed by taxpayer—reply brief lodged. 3/11/40 granted.
Mar. 12—Copy of motion and reply brief served on General Counsel.
Aug. 6—Findings of fact and opinion rendered—Miss Harron, Division 13. Decision will be entered under Rule 50.
Sept. 4—Agreed computation of deficiency filed.
Sept. 6—Decision entered—Miss Harron, Division 13.
Nov. 26—Petition for review by U. S. Circuit Court of Appeals, Tenth Circuit, with assignments of error filed by General Counsel.
Dec. 2—Proof of service filed. (Counsel.)
Dec. 5—Proof of service filed by General Counsel. (Taxpayer.)
Dec. 21—Motion for extension to 2/24/41 to complete and transmit record filed by General Counsel.
Dec. 21—Order enlarging time to 2/24/41 to prepare and transmit the record entered.

1941

Jan. 8—Statement of points filed by General Counsel with affidavit of service thereon.
Jan. 8—Designation of portions of record to be contained in review record filed by General Counsel with affidavit of service thereon.
Jan. 18—Proof of service of filing statement of points filed by General Counsel.
Jan. 18—Proof of service of filing designation of record filed by General Counsel.

Petition.

The above-named Petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in notice of deficiency, IT:CL:P-7 (FLD-90D), dated December 3, 1938 and for a finding and determination by the Board of an overpayment by petitioner of his income tax for the calendar year 1936 in the amount of $269.59 so that when the decision of the Board has become final, such overpayment, together with interest of such other sum as may be recoverable by law, shall be credited or refunded to Petitioner.

As a basis of his proceeding, Petitioner alleges, as follows:

1. The petitioner now is an individual with his office at 215 Colorado National Bank Building, Denver, Colorado. The returns for the period here involved were filed with the Collector of Internal Revenue for the District of Colorado at Denver, Colorado.

2. The notice of deficiency, a copy of which is attached hereto and marked "Exhibit A", was mailed to Petitioner on December 3, 1938.

3. The tax in controversy consists of income tax imposed for the calendar year 1936. The Respondent, by said notice of deficiency, has determined a deficiency of $690.84, which together with the said overpayment of $269.59, is the total amount in controversy.

4. The determination of the deficiency is based upon the following errors:

A. The holding of the Respondent that the market value of $4,000.00 face value at 5% Income Mortgage Bonds and 200 shares of capital stock of The Colorado Fuel and Iron Corporation, on September 1, 1936, was $85.25 and $32.25, respectively.

B. The holding of the Respondent that the surrender by Petitioner of $10,000.00 face value of Colorado Industrial Company 5% Bonds in exchange for $4,000.00 face value of 5% Income Mortgage Bonds and 200 shares of capital stock of The Colorado Fuel and Iron Corporation constituted a taxable exchange.

C. The holding of the Respondent that the surrender by the James Q. Newton Trust of $152,000.00 face value of Colorado Industrial Company 5% Bonds in exchange for $60,800.00 face value of 5% Income Mortgage Bonds and 3,040 shares of capital stock of The Colorado Fuel and Iron Corporation constituted a taxable exchange to said James Q. Newton Trust and increasing the amount of Petitioner's beneficial interest therein.

5. The facts upon which the Petitioner relies as the basis of this proceeding, are as follows:

A. First Assignment of Error:

The fair market value of $4,000.00 face value of 5% Income Mortgage Bonds and 200 shares of capital stock of The Colorado Fuel and Iron Corporation, on September 1, 1936, was $79.00 and $26.50, respectively.

B. Second Assignment of Error.

On March 1, 1935 there was filed in the District Court of the United States, for the District of Colorado, In the Matter of The Colorado Fuel and Iron Company and Another, Debtors, Consolidated Cause No. 8081, a Plan of Reorganization. At that time the Colorado Fuel and Iron Company had outstanding its own General Mortgage 5% Bonds, preferred stock and common stock, and it was also the guarantor on the First Mortgage 5% Bonds of the Colorado Industrial Company, a subsidiary corporation.

On April 25, 1936 the Court approved the Plan of Reorganization, which provided that a new company should be organized with an authorized capital of 1,000,000 shares of stock and $11,053,200.00 5% Income Mortgage Bonds. The new company was to assume the payment of the General Mortgage 5% Bonds of the Colorado Fuel and Iron Company, which were not disturbed; was to issue $11,053,200.00 of its Income Mortgage Bonds and 552,660 shares of its stock, in exchange for the First Mortgage 5% Bonds of The Colorado Industrial Company, in the ratio of $400.00 face value of new bonds and 20 shares of stock for each $1,000.00 face amount of Colorado Industrial Company bonds, and was to issue to preferred and common stockholders of the Colorado Fuel and Iron Company warrants to purchase certain specified amounts of stock of the new company at $35.00 per share on or before February 1, 1950; 315,379 shares of stock of the new company being reserved for this purpose.

In pursuance of the Plan of Reorganization, The Colorado Fuel and Iron Corporation was organized under the laws of the State of Colorado, and on June 20, 1936 the Court directed the Colorado Fuel and Iron Company, the Colorado Industrial Company, Arthur Roeder, Trustee, and The New York Trust Company, as Trustee under the

Colorado Industrial Company Mortgages securing its First Mortgage 5% Bonds, to convey to The Colorado Fuel and Iron Corporation all of their right, title and interest in all of the assets of the Colorado Fuel and Iron Company and the Colorado Industrial Company. Simultaneously therewith, The Colorado Fuel and Iron Corporation was directed to deliver to, or on the order of, the Reorganization Managers $11,053,200.00 of its Income Bonds, 552,660 shares of its stock and warrants representing the right to purchase 315,379 shares of its stock. This order further provides that upon the surrender of the outstanding bonds of Colorado Industrial Company to the Reorganization Managers, they should distribute to the holders thereof the Income Mortgage Bonds and capital stock of The Colorado Fuel and Iron Corporation to which they were entitled, respectively, under the Plan. And The New York Trust Company, Trustee, was directed to execute and deliver to The Colorado Fuel and Iron Corporation a satisfaction and discharge of the First Mortgage of the Colorado Industrial Company.

On July 1, 1936 the Plan of Reorganization was consummated in accordance with the foregoing order, and thereafter the Petitioner surrendered his $10,000.00 face amount of Colorado Industrial Company First Mortgage 5% Bonds in exchange for $4,000.00 face amount of the Income Mortgage Bonds and 200 shares of the stock of The Colorado Fuel and Iron Corporation.

At no time no shares of stock of The Colorado Fuel and Iron Corporation, other than the above-mentioned 552,660 shares of stock to be issued to the holders of Colorado Industrial Company First Mortgage 5% Bonds, were issued, so that immediately after the exchange, the holders of said Colorado Industrial Company bonds were in control of The Colorado Fuel and Iron Corporation.

C. Refund of Overpayment:

On August 4, 1937 Petitioner paid to the Respondent additional income taxes for the calendar year 1936 amounting to $269.59 on account of the surrender by Petitioner of $10,000.00 face value of Colorado Industrial Company 5% Bonds in exchange for $4,000.00 face value of 5% Income Mortgage Bonds and 200 shares of capital stock of The Colorado Fuel and Iron Corporation.

Wherefore, Petitioner prays that this Board may hear this proceeding and determine that there is no deficiency in Petitioner's income tax for the calendar year 1936 and find and determine that the Petitioner overpaid his income tax for the calendar year 1936 in the amount of $269.50 so that when the decision of this Board has become final, such payment, together with interest or such other sum as may be recoverable by law, shall be credited to refunded to Petitioner.

JAMES Q. NEWTON, JR.,
Colorado National Bank Building,
Denver, Colorado,
Petitioner.

[Verification omitted.]

Filed March 2, 1939, U. S. Board of Tax Appeals.

Exhibit A.

Treasury Department.
Washington.

December 3, 1938.

Mr. James Q. Newton, Jr.,
828—17th Street,
Denver, Colorado.

Dear Sir:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1936 discloses a deficiency of $690.84 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C1:P-7. The signing and filing of this form will expedite

the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner,
By (s) BERT E. HELVERN,
Internal Revenue Agent
in Charge.

Enclosures:
Statement.
Form of waiver. 870

Statement.

IT:CL:P-7
(FLD-90D)

Mr. James Q. Newton, Jr.
828—17th Street
Denver, Colorado

Tax Liability for the Taxable Year Ended December 31, 1936

	Liability	Assessed	Deficiency
Income Tax	$2,572.53	$1,881.69	$690.84

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated October 25, 1938.

Adjustments to Net Income.

Net income as disclosed by amended Return		$20,021.72
Unallowable deductions and additional income:		
(a) Loss of Partnership reduced	2,360.20	
(b) Fiduciary income increased	190.02	
(c) Capital Gain increased	1,120.00	3,670.22
Net income adjusted		23,691.94

Explanation of Adjustments.

(a) Loss claimed from Partnership of Boettcher-Newton & Co. Partnership, New York, N. Y., $3,244.72, is reduced to a loss of $884.52 as a result of the Revenue Agent's examination of the Partnership in New York as disclosed by letter of the

Internal Revenue Agent in Charge, 2nd New York District, dated May 17, 1938. Loss Reduced, $2,360.20.

(b) Fiduciary income increased, $190.02.

Your beneficial interest in the James Q. Newton Trust has been increased by $190.02 as follows:

Net income as per Fiduciary Income Tax Return	93,761.41
(1) Additional Capital Gain	79,709.75
(2) U. S. Income Tax deficiency for 1934 paid in 1936	1,520.22
Net income adjusted	174,991.38

(1) Your trust held $152,000.00 par value bonds of the Colorado Industrial Company's 5% 30-year Gold Bonds which were guaranteed by the Colorado Fuel & Iron Company.

The latter company reorganized under the name of Colorado Fuel & Iron Corporation, and exchanged its own bonds and stock (common) September 1, 1936 for the Colorado Industrial Company bonds.

The basis for this exchange was $400.00 par bonds and 20 shares of stock of the new company for each $1,000.00 par bonds of the Colorado Industrial Company.

For its $152,000.00 par bonds of the Colorado Industrial Company, your trust received in exchange therefor $60,800.00 par value bonds and 3,040 shares of common stock of the new Colorado Fuel & Iron Corporation.

This was a taxable exchange, although not so considered by the trust, and the Bureau held in letter addressed to this office, dated January 14, 1938, symbols: IT:EV:Se:PWL, the market value of the new securities on September 1, 1936 was determined to be as follows:

Bonds	$85.25
Stock	32.25

Following the decision of the Bureau as to the taxability of the exchange, the trust did not file an amended fiduciary return for 1936 but did file an amended return on form 1040, using the following values in the computation of the gain from the exchange:

Bonds	$79.00
Stock	26.50

The deficiency resulting from this adjustment was paid under protest and the trust intends to protest the present adjustment also, the chief basis for protest being the contention that the C. F. & I. marked up its assets prior to the reorganization some $13,000,000.00 and six months after the reorganization wrote their assets down by practically the same amount, hence the valuation for the new securities was not properly reflected in the Bureau's valuations, nor by the market quotations immediately following the reorganization, since any sales of consequence following the reorganization would have caused the market quotation to drop to a figure more in keeping with the true value of the securities in question.

For complete details of the computations involved in the exchange, see Exhibit A this report.

(2) U. S. Income Tax deficiency for 1934 paid in 1936 is an unallowable charge as expense as per Sec. 23 (c) (1) of the Revenue Act of 1936.

(a) Capital gains increased $1,120.00. You held 10 M par bonds of the Colorado Industrial Company, purchased 8-22-35 at a cost of $2,800.00. On September 1, 1936 these bonds were exchanged for 4 M par bonds and 200 shares of stock of the Colorado Fuel & Iron Corporation as the result of a reorganization. You did not consider this a taxable transaction and reported no gain or loss from the exchange.

The Bureau subsequently held the exchange to be taxable and determined the value of the new bonds and stock to have had a value as of September 1, 1936, date of exchange, as follows:

Bonds	$85.25
Stock	32.25

Pursuant to the Bureau's decision as to the taxability of the exchange, you filed an amended return and reported a taxable gain from the exchange of $4,528.00, computed as follows:

40 Bonds @ 79.00	3,160.00	
200 Stock @ 26.50	5,300.00	
Value of new securities	8,460.00	
Value of new securities, bro't fwd.		$8,460.00
Cost of old		2,800.00
Gain		5,660.00
80% Taxable, $4,528.00		

The correct taxable gain from the exchange is $5,648.00, or a difference of $1,120.00, computed as follows:

40 Bonds @ 85.25	3,410.00
200 Stock @ 32.25	6,450.00
Correct value new securities	9,860.00
Cost old securities	2,800.00
Correct Gain	7,060.00
80% taxable $5,648.00	

Summary.

Taxable Gain corrected	5,648.00
Taxable Gain reported	4,528.00
Additional Gain	1,120.00

Computation of Tax.

	Year 1936	
Net income adjusted		$23,691.94
Less: Personal exemption		1,000.00
Balance (Surtax Net Income)		22,691.94
Less: Earned Income Credit (Statutory)		300.00
Net income subject to normal tax		22,391.94
Normal Tax at 4% on $22,391.94	895.68	
Surtax on $18,691.94 (Amount in excess of $4,000.00)	1,677.63	
Total Tax		2,573.31
Less: Income tax paid at the source		.78
Corrected income tax liability		2,572.53
Income tax assessed: Original, Acct. No. 203006	1,620.27	
Additional, Acct. No. 204002	261.42	
Total assessed		1,881.69
Deficiency of income tax		690.84

Exhibit A.

C. I. C. Bonds Exchanged for C. F. & I. Stocks and Bonds, 9-1-36.

C. I. C.				C. F. & I.	
Purchased	Par	Cost	Exchanged	Bonds (Par)	Stock (Shares)
3-14-35	10,000.00	2,537.50	for	4,000.00	200
4-5-35	10,000.00	2,273.75	"	4,000.00	200
4-24-35	15,000.00	3,456.25	"	6,000.00	300
6-12-35	15,000.00	3,802.50	"	6,000.00	300
Group I	50,000.00	12,070.00		20,000.00	1,000
9-12-35	5,000.00	1,575.50	for	2,000.00	100
9-19-35	10,000.00	3,071.25	"	4,000.00	200
10-1-35	10,000.00	3,097.50	"	4,000.00	200
10-2-35	5,000.00	1,462.50	"	2,000.00	100
10-25-35	22,000.00	7,114.50	"	8,800.00	440
4-2-36	50,000.00	34,325.00	"	20,000.00	1,000.00
Group II	102,000.00	50,646.25		40,800.00	2,040
Total	152,000.00	62,716.25		60,800.00	3,040

Corrected		Used Amended No. 1040	
Group I		Group I	
200 Bonds @ $85.25	17,050.00	200 Bonds @ $79.00	15,800.00
1,000 Stock @ 32.25	32,250.00	1,000 Stock @ 26.50	26,500.00
Value of New	49,300.00	Value of New	42,300.00
Group II		Group II	
408 Bonds @ $85.25	34,782.00	408 Bonds @ $79.00	32,232.00
2,040 Stock @ 32.25	65,790.00	2,040 Stock @ 26.50	54,060.00
Value of New	100,572.00	Value of New	86,292.00

	Value New	Cost Old	Gain
I	49,300.00	12,070.00	37,230.00
II	100,572.00	50,646.25	49,925.75
	149,872.00	62,716.25	87,155.75
I	37,230.00 @ 80%		29,784.00
II	49,925.75 @ 100%		49,925.75
	Taxable Gain		79,709.75
	Reported No. 1041		
	Additional		79,709.75

	Value New	Cost Old	Gain
I	42,300.00	12,070.00	30,230.00
II	86,292.00	50,646.25	35,645.75
	128,592.00	62,716.25	65,875.75
I	30,230.00 @ 80%		24,184.00
II	35,645.75 @ 100%		35,645.75
		Reported Amended	
		No. 1040	59,829.75
		Corrected	79,709.75
		Additional	19,880.00

	Ratio	Exhibit B. Total	Capital Gains	Flat Provision	Balance Ordinary Net Inc.	2% Tax Paid at Source
(1) Trust, Form 1040, Denver, Colo.		129,418.23	129,418.23			
(2) Mrs. Nellie S. Newton 801 York St., Denver, Colo.	5/8	23,983.22		3,000.00	20,983.22	2.35
(3) James Q. Newton, Jr. 801 York St., Denver, Colo.	1/8	7,196.65		3,000.00	4,196.65	.78
(4) Nancy Newton Davis 75 Cherry St., Denver, Colo.	1/8	7,196.64		3,000.00	4,196.64	.78
(5) Ruth Newton Pierce 230 North St., Buffalo, N. Y.,	1/8	7,196.64		3,000.00	4,196.64	.77
		174,991.38	129,418.23	12,000.00	33,573.15	4.68

Answer.

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled proceeding, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Denies the allegations contained in paragraph 3 of the petition, except it is admitted that the taxes in controversy are income taxes for the calendar year 1936.

4. Denies that the Commissioner erred as alleged in paragraph 4 of the petition.

5. A, B, and C, inclusive, denies the matter set forth in *subpargraphs* A, to C, inclusive, of paragraph 5 of the petition. except it is admitted that petitioner surrendered $10,000.00 face amount of Colorado Industrial Company First Mortgage 5% Bonds in exchange for $4,000.00 face amount of the Income Mortgage Bonds and 200 shares of the stock of the Colorado Fuel and Iron Corporation.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied.

(Signed) J. J. WENCHEL, Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
R. P. Hertzog, Division Counsel.
A. R. Shannon, Jr., Special Attorney,
Bureau of Internal Revenue.

Filed April 18, 1939, United States Board of Tax Appeals.

[Findings of Fact and Opinion.]

Docket Nos. 97324, 97325. Promulgated August 6, 1940.

Corporation A owned all the stock of B. In 1913 it had acquired substantially all the assets of B. B owed to holders of bonds $27,633,000, principal amount of first mortgage bonds. A also was a debtor to the holders of the bonds, having guaranteed payment of both principal and interest. When the bonds matured in 1934 A and B defaulted on both principal and interest, and filed petitions for corporate reorganization under section 77B of the Bankruptcy Act. The District Court for Colorado approved a plan of reorganization. Pursuant to this plan all the assets of A and B were transferred to C, a new corporation. The holders of the above bonds received stock and bonds of C in exchange for their bonds and immediately controlled C. Held, the reorganization under section 77B of the Bankruptcy Act constituted a reorganization under section 112 (b) (3) of the Revenue Act of 1936, coming within the definition of a reorganization in section 112 (g) (1) (C).

Richard M. Davis, Esq., and Quigg Newton, Jr., Esq., for the petitioners.

Angus R. Shannon, Jr., Esq., and Carroll Walker, Esq., for the respondent.

In Docket No. 97324, James Q. Newton trust, the Commissioner determined a deficiency in income tax for the year 1936 in the amount of $12,325.60. Petitioner denies that there is a deficiency in tax and alleges that it has overpaid tax in the amount of $29,941.07. In Docket No. 97325, James Q. Newton, Jr., the Commissioner determined a deficiency in income tax for the year 1936 in the amount of $690.84. Petitioner denies that there is a deficiency in tax and alleges that he has overpaid tax in the amount of $296.59. Each petitioner concedes that some of the adjustments giving rise to the deficiencies have been determined correctly.

The only question involved is whether the exchange of bonds of the Colorado Industrial Co. for stock and bonds of the Colorado Fuel & Iron Corporation, a newly organized corporation, pursuant to a plan of reorganization under section 77B of the

Bankruptcy Act, constituted a reorganization under section 112 (b) (3) of the Revenue Act of 1936.

Findings of Fact.

The James Q. Newton trust is a fiduciary trust, with its principal office at Denver, Colorado. Prior to September 10, 1936, the James Q. Newton trust owned $152,000 face amount of Colorado Industrial Co., first mortgage 5 percent bonds due August 1, 1934.

James Q. Newton, Jr., is an individual residing in Denver, Colorado. Prior to September 10, 1936, he held $10,000 face amount of the same bonds of the Colorado Industrial Co.

The Colorado Industrial Co., hereinafter called Industrial, was a Colorado corporation. It was wholly owned by the Colorado Fuel & Iron Co., hereinafter called Fuel & Iron, a Colorado corporation, which owned all of its capital stock, consisting of 200 shares. Fuel & Iron had been engaged in the manufacture and sale of steel and iron products. Industrial was not engaged in any active business and had no assets of any substantial value, having transferred substantially all of its assets to Fuel & Iron in the year 1913.

Under date of August 1, 1904, Industrial issued bonds, generally known as first mortgage 5 percent bonds, which were secured by a mortgage or deed of trust of Industrial. The bonds matured August 1, 1934. These bonds of Industrial were unconditionally guaranteed both as to principal and interest by Fuel & Iron. These bonds were Industrial's only securities outstanding in the hands of the public. The total face amount of these bonds held by the public on August 1, 1934, was $27,633,000; in addition, Fuel & Iron owned $7,741,000 face amount. Industrial defaulted in the payment of interest on these bonds due on August 1, 1933, and on subsequent interest installments; and Fuel & Iron defaulted under its guarantee of interest payments.

Fuel & Iron had outstanding in the hands of the public in 1933 $4,500,000 face amount of bonds known as general mortgage 5 percent bonds. On August 1, 1933, Fuel & Iron defaulted in the payment of the semiannual interest due on its bonds. On the same day a receiver for the properties of Fuel & Iron was appointed by the United States District Courts of Colorado and Wyoming. Following the receivership of

Fuel & Iron, committees were constituted for the purpose of representing bondholders and stockholders of Fuel & Iron and for the bondholders of Industrial. There was outstanding stock of Fuel & Iron consisting of 20,000 shares of 8 percent cumulative preferred stock, $100 par value per share, and 340,505 shares of common stock, no par value. The preferred stock was entitled to cumulative dividends at the rate of 8 percent per annum, but ranked equally with the common stock in the distribution of assets. Dividends had not been paid on the preferred stock since November 25, 1931.

On August 1, 1934, when Industrial and Fuel & Iron defaulted on Industrial's first mortgage 5 percent bonds, each company filed petitions with the United States District Court for Colorado instituting proceedings for reorganization under section 77B of the Federal Bankruptcy Act. The previously appointed receiver of Fuel and Iron was appointed trustee of the properties of both companies in the reorganization proceedings.

A plan of reorganization of Fuel & Iron and Industrial, dated March 1, 1935, was drafted by the reorganization managers at the request of the separate committees for the bondholders of the two companies, and this proposed plan, pursuant to section 77B of the Bankruptcy Act, was filed with the District Court. On May 1, 1935, an order of the District Court was entered finding and decreeing that the plan complied with the provisions of subdivision (b) of section 77B of the Bankruptcy Act, and that it had been duly prepared in accordance with subdivision (d) of section 77B. Among other things the court directed the trustee to mail copy of the plan and forms of acceptance of the plan to holders of bonds and stocks of Fuel & Iron, and of bonds of Industrial; which was done. Acceptances of the plan were filed by the holders of Industrial bonds and of the preferred and common stock of Fuel & Iron as follows:

Security	Amount outstanding	Plan approved by holders of—
Industrial bonds	$27,633,000	75.7%
Fuel & Iron pfd. stock	20,000 shares	61.3%
Fuel & Iron com. stock	340,505 shares	53.2%

On April 25, 1936, the District Court entered its order confirming the plan. By this order the court approved the

certificate of incorporation of a new corporation, the Colorado Fuel & Iron Corporation, hereinafter referred to as the new company. That certificate had been filed in the office of the Secretary of State of Colorado on April 16, 1936. The authorized capital of the new company was 1,000,000 shares of common stock without par value. On June 20, 1936, the District Court entered its order approving forms of documents and directing, among other things, the transfer of all of the assets of Fuel & Iron and Industrial to the new company, which was done by executing proper conveyances.

The purpose of the reorganization plan was as follows:

(1) To strengthen the capital structure of the enterprise, through drastic reduction of fixed charges and the provision of a financing medium for future financial requirements.

(2) To give full recognition to the paramount rights of bondholders.

(3) To enable the stockholders to regain an interest in the enterprise upon a basis which takes account of the present junior rank of the stockholders and of the relative rights and priorities of the two classes of stock.

The effect of the plan was to give to the holders of Industrial's bonds the entire ownership and control of the new company, subject to $4,500,000 bonds of Fuel & Iron which were not to be disturbed in the reorganization. Since the Industrial bonds were in default on both principal and interest, the only stock of the new company to be issued was 552,660 shares which were to be issued to the holders of Industrial bonds in exchange.

Under the approved plan of reorganization and orders of the District Court the following was done:

(1) As of July 1, 1936, the assets of Fuel & Iron and of Industrial were transferred by proper conveyances to the new company.

(2) The new company issued 552,660 shares of its stock to be distributed to holders of bonds of Industrial, reserved 315,379 shares to be applied against warrants, and reserved the remaining 131,961 shares for corporate purposes. It issued $11,053,200 principal amount of 5 percent income mortgage bonds due April 1, 1970, to be distributed to Industrial's bondholders. It assumed payment of $4,500,000 general bonds of

Fuel & Iron, which bonds were not affected by the reorganization plan. It issued warrants for the purchase, on or before April 1, 1950, of 315,379 shares of its stock at $35 a share to be distributed to the preferred and common stockholders of Fuel & Iron. The warrant agreement entered into between the new company and the Chase National Bank of New York, warrant agent, under date of July 1, 1936, provided that the holders of warrants should not have the right to vote or to receive notice as stockholders, and should have no rights whatsoever as stockholders of the new company. The option price under the warrants was considerably higher than the opening market price for shares of the new company.

(3) The reorganization managers gave notice to the holders of Industrial's bonds and Fuel & Iron's stock that the new securities would be available for distribution on September 1, 1936.

(4) At or about that date the holders of Industrial bonds surrendered their bonds for cancelation in exchange for income mortgage bonds and stock of the new company upon the basis of (a) $400 principal amount of income bonds and (b) 20 shares of common stock for each $1,000 principal amount of Industrial bonds. Immediately after the consummation of the plan all of the issued stock of the new company, 552,660 shares of common stock, belonged to the former holders of bonds of Industrial. No stock was issued to parties other than such bondholders until October 23, 1936, when 37 shares were issued upon the exercise of warrants, and by June 30, 1938, only 465 shares had been issued upon the exercise of warrants.

(5) At or about the same date warrants to purchase common stock of the new company were distributed to preferred and common stockholders of Fuel & Iron as follows: For each share of preferred stock of Fuel & Iron, one warrant to purchase, on or before February 1, 1950, three shares of common stock of the new company at $35 per share. For each share of common stock of Fuel & Iron there was given one warrant to purchase three-fourths of one share of common stock of the new company at $35 a share.

(6) The capital stock of Industrial was canceled. Also, $7,741,000 principal amount of Industrial's bonds owned by

Fuel & Iron were canceled. The first mortgage of Industrial which had secured its bonds was satisfied and discharged. These bonds had been held in Fuel & Iron's treasury, but they had not been set up as an asset or liability on the books. The amount of Industrial's bonds that had been carried on Fuel & Iron's books as a liability was $27,633,000.[1]

On September 10, 1936, petitioner, the James Q. Newton trust, surrendered its Industrial bonds in the face amount of $152,000 and received in exchange $60,800 face amount of income mortgage bonds and 3,040 shares of stock of the new company.

On September 10, 1936, the petitioner, James Q. Newton, Jr., surrendered his Industrial bonds in the face amount of $10,000 and received in exchange $4,000 face amount of income mortgage bonds and 200 shares of stock of the new company.

On the date of exchange the fair market value of the securities of the new company received in exchange by petitioners was $79 for each $100 face amount of income mortgage bonds and $27.25 for each share of stock. The total fair market value on the date of exchange of the securities of the new company received by the James Q. Newton trust was $130,872, and the total fair market value on the date of exchange of the new securities received by James Q. Newton, Jr., was $8,610.

Opinion.

Harron: The petitioners contend that the reorganization of Fuel & Iron and Industrial under section 77B of the Bankruptcy Act, which resulted in an exchange of bonds of Industrial for bonds and stock of the new company, constituted a

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[1] The aggregate amount of Industrial's bonds in default on August 1, 1934, carried on Fuel & Iron books was $27,633,000. The Industrial bonds had been set up on Fuel & Iron books as a liability in the following way:

Industrial bonds authorized	45,000,000
Issued	39,000,000
Redeemed and canceled	3,626,000
	35,374,000
Less—held in treasury	7,741,000
Principal amount in default	27,633,000

reorganization as defined in either provision (A) or (C) of section 112 (g) (1)[2] of the Revenue Act of 1936, so that recognition of gain or loss is precluded under section 112 (a) and (b) (3)[3] of the same act. The petitioners further contend that, if the transaction did not constitute a "reorganization" within the meaning of the above sections, nevertheless any gain resulting therefrom is nontaxable under section 112 (b) (5) of the Revenue Act of 1936.[4]

The respondent contends that there was not a "statutory merger or consolidation" within (A) of section 112 (g) (1), since the facts fail to show that the plan of reorganization

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[2] SEC. 112. RECOGNITION OF GAIN OR LOSS.

* * * * * * *

(g) Definition of Reorganization—As used in this section and section 113—

(1) The term "reorganization" means (A) a statutory merger or consolidation, * * * or (C) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (D) a recapitalization, or (E) a mere change in identity, form or place of organization, however effected.

[3] SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) General Rule.—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) Exchanges Solely in Kind—

* * * * * * *

(3) Stock for Stock on Reorganization.—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

[4] SEC. 112. RECOGNITION OF GAIN OR LOSS.

* * * * * * *

(b) Exchanges Solely in Kind—

* * * * * * *

(5) Transfer to Corporation Controlled by Transferor.—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange to two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

under section 77B was executed by a merger or consolidation in pursuance of the laws of Colorado or Federal law. Respondent relies upon the statement in article 112 (g)-2 of Regulations 94 that, "The words 'statutory merger or consolidation' refer to a merger or a consolidation effected in pursuance of the corporation laws of the United States or a State or Territory or the District of Columbia." The respondent also contends that the reorganization under section 77B of the Bankruptcy Act does not come within the definition of a reorganization in the applicable revenue act, within (C) of section 112 (g) (1). Respondent argues that the bondholders of Industrial may not be considered as the "stockholders of the transferor." He relies on the fact that stockholders of Fuel & Iron were given warrants to buy stock in the new company. But, conceding for purposes of argument, that the stockholders of the transferor lost their equity in the properties transferred to the new company and that this case comes within the rule of Commissioner v. Kitselman, 89 Fed. (2d) 458; certiorari denied, 302 U. S. 709, respondent, argues that the opinion in LeTulle v. Scofield, 308 U. S. 415, strongly indicates that the Kitselman case was wrongly decided. Respondent concedes that the facts in the LeTulle case differ from and are not analogous to the facts in the Kitselman case or in this case.

Petitioner urges at length that there was a "statutory" consolidation of Industrial and Fuel & Iron under a Federal statute, namely, subsection (b) (9) of section 77B of the Bankruptcy Act. See United States Statutes at Large, 73d Cong., vol. 48-1, pp. 1912-1914.[5] We do not agree with this contention. First, in our opinion the Commissioner's statement in article 112 (g)-2 of Regulations 94, quoted above, appears to be correct and a statement of the obvious. Second, the power to effect a consolidation of corporations "must be derived from the law of the sovereignty or state which creates the

[5] SEC. 77B. Corporate reorganizations— • • •

(b) A plan of reorganization within the meaning of this section • • • (9) shall provide adequate means for the execution of the plan, which may include the transfer of all or any part of the property of the debtor to another corporation or to other corporations, or the consolidation of the properties of the debtor with those of another corporation, or the merger or consolidation of the debtor into or with another corporation or corporations, or • • •

corporation seeking to exercise it," Fletcher, Cyclopedia of Corporations, vol. 15, ch. 61, sec. 7048, and the steps and proceedings to effect a consolidation are formal and must be in accordance with the law of the jurisdiction. Fletcher, Cyclopedia of Corporations, supra, secs. 7066-7074. While a corporation formed to carry out steps in a plan of reorganization under section 77B of the Bankruptcy Act may be under the control of the Federal District Court having jurisdiction, a new corporation can come into existence only in compliance with state authority. Old Fort Improvement Co. v. Lea, 89 Fed. (2d) 286. In the proceedings involved here, the charter of the new company was obtained from the State of Colorado. The statutes of Colorado prescribe the way in which a consolidation may be consummated. Comp. Laws of Colorado, 1921, ch. 88 D., p. 754, sec. 2287; 1935 Colorado Stats. Ann., ch. 41 sec. 54. So far as the facts show, no articles of consolidation or merger were filed in the proper state office. The plan of reorganization approved by the District Court does not refer to a consolidation as the means of executing the plan. The provisions of subsection (b) (9) of section 77B of the Bankruptcy Act provide for several permissive methods of executing a plan of reorganization, among which are a merger or consolidation. But it may not be assumed that a "statutory merger or consolidation" was effected merely from the general facts relating to the way in which a reorganization under section 77B is executed. It is a matter to be proved whether such a plan of reorganization was executed by a statutory merger or consolidation, and, in our opinion, petitioner has not so proved in this case. See also Report of Committee on Ways and Means, No. 704, 73d Cong., 2d sess., p. 14, for the reasons for inserting the word "statutory" before "merger or consolidation" in section 112 (g) (1) (A) of the Revenue Act of 1934.

However, we are of the opinion that the reorganization under section 77B of the Bankruptcy Act constituted a reorganization under section 112 (b) (3) of the Revenue Act of 1936, within (C) of section 112 (g) (1). In our opinion the situation here is very much like the situation in the Kitselman case, supra, and the question is controlled by that case. In the Kitselman case, after the various steps had been taken the bondholders of the old company were in control of the new company, and this somewhat unusual situation presented difficulty because section 112 (g) (1) (C) predicates a reorganization on the requirement

that the transferor or the stockholders of the transferor be in control of the new company. The court reasoned that where the old company is insolvent and its assets are transferred to a new company formed by the bondholders' representatives, the bondholders occupy a status somewhat akin to that of preferred stockholders, for all practical purposes. The court stated the following:

> Bondholders ordinarily are viewed as creditors, but when the assets of the corporation are less than its obligations, the bondholders are in actuality and for all practical purposes pretty much the corporation. * * *
>
> It is clear that the bondholders were the moving spirit and were treated as the owners in fact, and it follows that they must be viewed as a class of "stockholders" somewhat akin to preferred stockholders with cumulative dividend rights. * * * Where the assets of the corporation fall far below the amount required to pay the bondholders in full, the bondholders in bankruptcy reorganization supersede the stockholders. They acquire the stockholders' rights to manage the corporate affairs. There is a difference between the position of stockholders in a case like the present one and stockholders of a corporation in bankruptcy proceeding under section 77B (U. S. C. A. § 207) to a reorganization, but the analogies are sufficient to justify a study of the decisions in the latter field.

The above reference in the quotation to a reorganization under section 77B of the Bankruptcy Act is significant here. In our opinion the situation in this case is as favorable, if not more favorable, to petitioner's contention than was the situation in the Kitselman case, because here there was a reorganization under section 77B of the Bankruptcy Act.

As in the Kitselman case, the difficulty is that of determining whether the holders of the Industrial bonds were the "transferor or its stockholders" within that clause in (C) of section 112 (g) (1). The situation is somewhat more complex here because there were two transferors, Industrial and Fuel & Iron, albeit they were subsidiary and parent corporations, and the holders of the Industrial bonds were creditors of both companies, Fuel & Iron having acquired substantially all the assets, securing the bonds under a first mortgage, and having unconditionally guaranteed the interest and principal of the bonds of Industrial. However, this complexity is not important,

in our opinion. Neither the bondholders nor the stockholders of either of the old companies received any profit from the reorganization. The old companies transferred all their assets to the new company and immediately thereafter the old companies, through the bondholders, were in control of the corporation to which the assets were transferred. The holders of Industrial bonds were creditors having claims aggregating $27,633,000 for principal due, and $2,763,300 for interest due. They were the creditors with prior claims, secured by a first mortgage on assets in the hands of Fuel & Iron, and they were treated as the owners in fact of the assets transferred to the new company. It must follow here, as in the Kitselman case, that the holders of the Industrial bonds be viewed as a class of "stockholders." So viewed, they come within (C) of section 112 (g) (1).

The following is pointed out in support of the above conclusion. Industrial and Fuel & Iron had been placed in receivership and had petitioned for a reorganization under section 77B of the Bankruptcy Act. The stockholders of both of the companies had lost their equity. This was recognized by the plan of reorganization, under which the entire ownership of the new company was turned over to the holders of Industrial bonds, and the stockholders were given, merely, warrants entitling them to purchase stock in the new company at a price considerably above the then market value. The treatment accorded various security holders of the old companies is described in the plan of reorganization as follows:

Under the Plan, the Industrial Bondholders are to receive for each $1,000 principal amount of Bonds (together with the unpaid interest thereon which amounted to 10% to February 1, 1935): (a) $400 principal amount of new 5% Income Mortgage Bonds and (b) 20 shares of new Common Stock. The Industrial Bondholders are to receive all of the new Income Mortgage Bond and all of the new Common Stock of the New Company to be presently issued in the reorganization. The entire issue of Industrial Bonds outstanding in the aggregate principal amount of $27,633,000 is in default. Interest on the Industrial Bonds accrued and unpaid to February 1, 1935 amounts to $2,763,300. Accordingly, in the first instance, the Plan gives to the holders of the Industrial Bonds the entire ownership and control of the New Company, subject to $4,500,000 of Fuel Bonds which are undisturbed in the reorganization.

The Plan, however, does not in its effect on stockholders operate as a strict foreclosure, since the stockholders are to receive Warrants entitling them at their option to purchase, at any time until February 1, 1950, a stock equity in the New Company at $35 per share. The price at which *stockholders, under the terms of such Warrants, may regain an equity position in the enterprise*, takes into consideration the basis upon which the Industrial Bondholders are to receive shares of new Common Stock in exchange for that part of their debt not covered by new Income Mortgage bonds. [Emphasis supplied.]

The assets of the old companies were transferred to the new company, and immediately thereafter the bondholders were in control of the new company by virtue of the immediate transfer of 552,660 shares of stock of the new company to the reorganization managers, who were the agents of the bondholders. The holders of warrants to purchase new stock in the new company had no control. Control relates to issued, not to authorized, stock. Louangel Holding Corporation v. Anderson, 9 Fed. Supp. 550; C. T. Investment Co. v. Commissioner, 88 Fed. (2d) 582. Clearly there was an exchange of securities in one corporation a party to a reorganization, in pursuance of a plan of reorganization, solely for securities in another corporation a party to the reorganization. (Sec. 112 (b) (3).) All three corporations were parties to the reorganization. (Sec. 112 (g) (2).) The bondholders of Industrial retained a substantial stake or proprietary interest in the enterprise. There was a continuity of interest of the transferors in the transferee, evidenced by stocks and bonds of the new company. The holders of Industrial bonds acquired the stockholders' rights to manage the corporate affairs.

With respect to the argument of respondent that the opinion in the LeTulle case indicates that the decision in the Kitselman case is wrong and that Helvering v. Tyng, 308 U. S. 527, also points that way, we believe the argument without merit. The fact that the bondholders herein retained a proprietary interest in the enterprise is a material difference between the factual situation in this case and the factual situation in either the LeTulle case or the Tyng case. Such cases are therefore clearly distinguishable and not applicable here. In the LeTulle case when a stockholder of the transferor received bonds and

cash of the transferee in exchange for his stocks, there was no continuity of interest. In the Tyng case, where the stockholders of the transferors received cash and long term indebtedness of the transferee in exchange for their stock, there was no continuity of interest. In both the LeTulle case and the Tyng case stockholders of the transferor became mere creditors of the transferee, whereas in this case creditors (the Industrial bondholders) became stockholders of the transferee, and after the transfer they were in control of the corporation to which the assets were transferred. Also, we believe that E. P. Raymond, 37 B. T. A. 423, cited by respondent, is not applicable here. The point in this case is that the bondholders received all the presently issued stock of the new company, thereby gaining control thereof.

It is held that the reorganization under section 77B of the Bankruptcy Act was executed so as to constitute a reorganization as defined in section 112 (g) (1) (C), and the gain or loss resulting therefrom is not recognizable under section 112 (b) (3). See also Commissioner v. Newberry Lumber & Chemical Co., 94 Fed. (2d). 447; Marlborough House, Inc., 40 B. T. A. 882; Edith M. Greenwood, 41 B. T. A. 664; Alabama Asphaltic Limestone Co., 41 B. T. A. 324.

In view of the foregoing it is not necessary to consider whether or not the transactions come within section 112 (b) (5).

Reviewed by the Board.

Decision will be entered under Rule 50.

Van Fossan, Leech, Turner, and Disney dissent.

Murdock dissents for reasons expressed in his dissent in Alabama Asphaltic Limestone Co., 41 B. T. A. 324.

Decision.

Pursuant to the Board's Findings of Fact and Opinion promulgated August 6, 1940, the petitioner herein having on September 4, 1940, filed a recomputation of tax, and the respondent having agreed thereto, now, therefore, is is

Ordered and Decided: That there is an overpayment in

income tax of $317.88 for the year 1936, which amount was paid within three years before the filing of the petition. (Sec. 809 (a), Revenue Act of 1938.)

(Seal) (s) MARION J. HARRON, Member.

Entered September 6, 1940.

Petition for Review and Assignments of Error.

To the Honorable Judges of the United States Circuit Court of Appeals for the Tenth Circuit:

Now Comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Charles E. Lowery, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

Jurisdiction.

That he is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States; that the respondent on review, James Q. Newton, Jr. (hereinafter referred to as the taxpayer), is a citizen of the United States residing in Denver, Colorado. The taxpayer filed his Federal income tax return for the taxable year 1936 with the Collector of Internal Revenue for the District of Colorado, whose office is located in the City of Denver, Colorado, and within the judicial circuit of the United States Circuit Court of Appeals for the Tenth Circuit.

The Commissioner files this petition pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

II.

Prior Proceedings.

On December 3, 1938, the Commissioner determined a deficiency in Federal income tax liability against the taxpayer for the year 1936 in the amount of $690.84 and sent to the taxpayer, by registered mail, a notice of said deficiency in

accordance with the provisions of existing internal revenue laws. Thereafter and on March 2, 1939, the taxpayer filed an appeal from said determination of the Commissioner with the United States Board of Tax Appeals.

The case was duly tried to the United States Board of Tax Appeals and on August 6, 1940, the Board promulgated its findings of fact and opinion (42 B. T. A. No. 73), pursuant to which opinion decision was entered on September 6, 1940, wherein and whereby it was ordered and decided that there is an overpayment in income tax for the year 1936 in the amount of $317.88.

III.

Nature of Controversy.

Prior to September 10, 1936, the taxpayer was the owner of $10,000 face amount of first mortgage 5 per cent bonds of the Colorado Industrial Company, a Colorado corporation (hereinafter referred to as Industrial), which bonds were due on August 1, 1934. The capital stock of Industrial was wholly owned by the Colorado Fuel & Iron Company (hereinafter called Fuel & Iron) and its bonds were unconditionally guaranteed as to principal and interest by the latter company. Industrial's bonds of the face amount of $27,633,000 were held by the public on August 1, 1934 and $7,741,000 face amount thereof was held by Fuel & Iron. Industrial defaulted in the payment of interest on its bonds on August 1, 1933 and on subsequent interest installments, and Fuel & Iron defaulted under its guarantee of interest payments.

In 1933 Fuel & Iron had $4,500,000 face amount of general mortgage 5 per cent bonds outstanding in the hands of the public. It defaulted in the payment of the semi-annual interest due on those bonds on August 1, 1933. On the latter date a receiver was appointed for Fuel & Iron's properties by the United States District Courts of Colorado and Wyoming. When the two corporations later defaulted on Industrial's first mortgage 5 per cent bonds, on August 1, 1934, each company filed a petition with the United States District Court of Colorado seeking a reorganization under Section 77B of the Federal Bankruptcy Act, whereupon the receiver previously appointed for Fuel & Iron was appointed trustee of the properties of both companies. On April 25, 1936, the District Court con-

firmed a plan of reorganization previously filed wih the Court and accepted by a majority of Industrial's bondholders and Fuel & Iron's common and preferred stockholders. The court approved the certificate of incorporation of a new corporation, the Colorado Fuel & Iron Corporation, and on June 20, 1936, entered its order directing, among other things, the transfer of all of the assets of Fuel & Iron and Industrial to the new corporation which was done, as of July 1, 1936 by the execution of proper conveyances.

Under the plan of reorganization as approved by the Court, the only stock of the new company to be issued was 552,660 shares which were to be issued to the holders of Industrial's bonds in exchange. Pursuant to the plan the new company issued 552,660 shares of its stock to be distributed to the holders of Industrial's bonds, reserved 315,379 shares to be applied against warrants which it issued, in accordance with the plan, to the preferred and common stockholders of Fuel & Iron, and reserved the remaining 131,961 shares for corporate purposes. The warrants were issued, under the plan, to enable Fuel & Iron's stockholders to regain an interest in the enterprise, if they so desired, at $35 a share on or before April 1, 1950, but the warrant agreement filed with the Chase National Bank of New York, warrant agent, provided that the holders of warrants should have no rights whatsoever as stockholders of the new company. During the year 1936, only 37 shares of stock of the new company were issued by reason of the exercise of warrants. The new company also issued, pursuant to the plan, $11,053,200 principal amount of five per cent income mortgage bonds due April 1, 1970, to be distributed to Industrial's bondholders, and assumed payment of $4,500,000 face amount of Fuel & Iron's general bonds. Industrial's bondholders thereupon gained the entire ownership and control of the new company subject to the $4,500,000 bonds of Fuel & Iron which were not disturbed in the reorganization.

On September 10, 1936, the taxpayer surrendered his industrial bonds in the face amount of $10,000 and received therefor $4,000 face amount of income mortgage bonds and 200 shares of stock of the new company. In his original Federal income tax return the taxpayer reported no gain or loss on the exchange. In his notice of deficiency the Commissioner treated the exchange as a taxable one. The taxpayer contended that

the Section 77B reorganization of Fuel & Iron and Industrial constituted a non-taxable reorganization under Section 112 of the Revenue Act of 1936. The Board of Tax Appeals agreed with the taxpayer's contention and redetermined the tax liability accordingly.

IV.

Assignments of Error.

The Commissioner avers that in the record and proceedings before the United States Board of Tax Appeals and in the opinion and final decision rendered and entered by the United States Board of Tax Appeals, manifest error occurred and intervened to the prejudice of the Commissioner who now assigns the following errors and each of them, which he avers occurred in said record, proceedings, opinion, and final decision so rendered and entered by the United States Board of Tax Appeals:

The United States Board of Tax Appeals erred—

1. In ordering and deciding that there is an overpayment in income tax for the year 1936 in the amount of $317.88.

2. In failing to sustain the deficiency determined by the Commissioner, less a proper reduction of said deficiency to reflect the adjustments agreed upon by the parties at the hearing before the United States Board of Tax Appeals.

3. In holding and deciding that the reorganization under Section 77B of the Bankruptcy Act constituted a reorganization under Section 112 (b) (3) of the Revenue Act of 1936, coming within the definition of a reorganization in Section 112 (g) (1) (C).

4. In failing to hold and decide that the reorganization under Section 77B of the Bankruptcy Act did not constitute a reorganization under Section 112 (b) (3) of the Revenue Act of 1936, coming within the definition of a reorganization in Section 112 (g) (1) (C).

5. In holding that there was a continuity of interest of the transferors in the transferee within the scope and meaning of Section 112 (g) (1) (C) of the Revenue Act of 1936.

6. In holding and deciding that the gain resulting to the

taxpayer from the exchange was not recognizable under Section 112 (b) (3).

7. In that its opinion and decision are not supported by its findings of fact and are contrary to law.

Wherefore, the Commissioner petitions that the decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Tenth Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said court.

(s) SAMUEL O. CLARK, JR.,
Assistant Attorney General.
(Signed) J. P. WENCHEL, Chief Counsel,
R. L. W.
Bureau of Internal Revenue.

Of Counsel: Charles E. Lowery, Special Attorney, Bureau of Internal Revenue.

[Verification omitted.]

Filed November 26, 1940, United States Board of Tax Appeals.

Notice of Filing Petition for Review.

To: Mr. James Q. Newton, Jr.,
Colorado National Bank Building,
Denver, Colorado.

You are hereby notified that the Commissioner of Internal Revenue did, on the 26th day of November, 1940, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Tenth Circuit of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and assignments of error as filed is hereto attached and served upon you.

Dated this 26th day of November, 1940.

B. D. GAMBLE,
Clerk, United States Board of
Tax Appeals.

Service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein is hereby acknowledged this 29th day of November, 1940.

(s) RICHARD M. DAVIS,
(s) QUIGG NEWTON, JR.,

Counsel for Respondent on Review.

Filed Dec. 2, 1940.

Notice of Filing Petition for Review.

To:

Mr. James Q. Newton, Jr.,
Colorado National Bank Building,
Denver, Colorado.

You are hereby notified that the Commissioner of Internal Revenue did, on the 26th day of November, 1940, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Tenth Circuit of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and assignments of error is hereto attached and served upon you.

Dated this 26th day of November, 1940.

(Signed) J. P. WENCHEL, RLW,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 29th day of November, 1940.

(s) JAMES Q. NEWTON, Respondent on Review.

Filed Dec. 5, 1940. United States Board of Tax Appeals.

Statement of Points.

Comes now the petitioner on review herein and makes this concise Statement of Points on which he intends to rely on the review herein, to-wit:

The United States Board of Tax Appeals erred—

1. In ordering and deciding that there is an overpayment in income tax for the year 1936 in the amount of $317.88.

2. In failing to sustain the deficiency determined by the Commissioner, less a proper reduction of said deficiency to reflect the adjustments agreed upon by the parties at the hearing before the United States Board of Tax Appeals.

3. In holding and deciding that the reorganization under Section 77B of the Bankruptcy Act constituted a reorganization under Section 112 (b) (3) of the Revenue Act of 1936, coming within the definition of a reorganization in Section 112 (g) (1) (C).

4. In failing to hold and decide that the reorganization under Section 77B of the Bankruptcy Act did not constitute a reorganization under Section 112 (b) (3) of the Revenue Act of 1936, coming within the definition of a reorganization in Section 112 (g) (1) (C).

5. In holding that there was a continuity of interest of the transferors in the transferee within the scope and meaning of Section 112 (g) (1) (C) of the Revenue Act of 1936.

6. In holding and deciding that the gain resulting to the taxpayer from the exchange was not recognizable under Section 112 (b) (3).

7. In that its opinion and decision are not supported by its findings of fact and are contrary to law.

(Signed) J. P. WENCHEL, CAR,
Chief Counsel,
Bureau of Internal Revenue.

Statement of Service: A copy of this Statement of Points was mailed to attorneys on review this date, January 8, 1941.

(Signed) J. P. WENCHEL, CAR,
Chief Counsel,
Bureau of Internal Revenue.

Filed January 8, 1940, United States Board of Aax Appeals.

Designation of Portions of Record to be Contained in Record on Review.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause, in connection with the petition for review by the said Circuit Court of Appeals for the Tenth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.

2. Pleadings before the Board:

   (a) Petition, including annexed copy of deficiency letter and statement attached thereto.

   (b) Answer.

3. Findings of fact and opinion promulgated August 6, 1940.

4. Decision entered September 6, 1940.

5. Petition for review, together with proof of service of notices of filing petition for review and of service of a copy of petition for review.

6. Statement of Points.

7. This designation of portions of record to be contained in record on review.

Signed J. P. WENCHEL, CAR
Chief Counsel,
Bureau of Internal Revenue.

Statement of Service: A copy of this designation of portions of record to be contained in record on review was mailed to attorneys for respondent on review this date, January 8, 1941.

(Signed) J. P. WENCHEL, CAR,
Chief Counsel,
Bureau of Internal Revenue.

Filed January 8, 1941, United States Board of Tax Appeals.

Order Enlarging Time.

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation and transmission of the record *sur* petition for review of the above entitled proceeding in the United States Circuit Court of Appeals for the Tenth Circuit, be and it is hereby extended to February 24, 1941.

(Signed) CHARLES P. SMITH, Member.

Now, February 7th, 1941, the foregoing is certified from the record as a true copy. B. D. Gamble, Clerk, U. S. Board of Tax Appeals.

Dated: Washington, D. C., Dec. 21, 1940. jd.

Filed February 11, 1941, Robert B. Cartwright, Clerk.

[Clerk's Certificate.]

I, B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 44, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 7th day of February, 1941.

(Seal) B. D. GAMBLE, Clerk,
United States Board of Tax Appeals.

Filed February 11, 1941, Robert B. Cartwright, Clerk.

[Suppiemental Transcript of Record.]

Stipulation of Facts.

It Is Hereby Stipulated and Agreed by and between the parties hereto, by their respective counsel, that the following is a true statement of the facts here involved:

1. Petitioner now is an individual resident of Denver,

Colorado, with his office at 215 Colorado National Bank Building, Denver, Colorado. The income tax returns here involved (copies of which, marked, respectively, Exhibits "A" and "B", are attached hereto and by this reference made a part hereof) were filed with the Collector of Internal Revenue for the District of Colorado, at Denver, Colorado. At all times herein mentioned Petitioner has kept his books and filed his returns on a cash receipts and disbursements basis.

2. The notice of deficiency, (copy of which is attached hereto, marked Exhibit "C"), was mailed to Petitioner on December 3, 1938.

3. The taxes in controversy consist of income taxes for the calendar year 1936, in two amounts:

(a) The amount of $269.59 which Petitioner paid under protest upon filing his amended return and which Petitioner claims is an overpayment.

(b) The amount of $690.84 stated in Respondent's notice of deficiency, less certain deficiencies which are uncontroverted and which Petitioner admits, amounting to approximately $270.46 more or less, which amount is to be adjusted.

The total amount in controversy, therefo. , does not exceed $960.43.

4. On March 12, 1935 there was filed in the District Court of the United States, for the District of Colorado, In the Matter of The Colorado Fuel and Iron Company and Another, Colorado Corporations, Debtors, Consolidated Cause No. 8081, a Plan of Reorganization (a copy of which, marked "Exhibit D" is attached hereto and by reference made a part hereof). At that time The Colorado Fuel and Iron Company had outstanding its own General Mortgage Five Per Cent. Bonds, preferred stock and common stock, and it was also the guarantor on the First Mortgage Five Per Cent. Bonds of The Colorado Industrial Company, a wholly owned subsidiary. These bonds of The Colorado Industrial Company were its only securities outstanding in the hands of the public. Both of these corporations were before the Court on their petitions for reorganization under Section 77-B of the Bankruptcy Act, filed August 1, 1934.

5. On March 12, 1935 the Court entered its order finding that the Plan had been proposed in accordance with the provisions of Section 77-B and ordering that the holders of Colorado Industrial Company Bonds and the preferred and common stockholders of The Colorado Fuel and Iron Company be notified of the Plan and given the opportunity to express their acceptance thereof. Copies of said Order and of the form of acceptance for bonds in registered and in bearer form, marked Exhibits "E", and "F" and "G", are attached hereto and by this reference made a part hereof.

6. On April 25, 1936 the Court entered its Findings of Fact and Conclusions of Law and its Order confirming the Plan of Reorganization and finding that it was fair and equitable and did not discriminate unfairly in favor of any class of creditors or stockholders. A copy of these Findings, Conclusions and Order, marked Exhibit "H", is attached hereto and by this reference made a part hereof. The Plan of Reorganization, as so approved, provided that a new company should be organized with an authorized capital of 1,000,000 shares of stock and $11,053,200.00 Five Per Cent. Income Mortgage Bonds. The new company was to assume the payment of the General Mortgage Five Per Cent. Bonds of The Colorado Fuel and Iron Company. It was to issue $11,053,200.00 of its Income Mortgage Bonds and 552,660 shares of its stock in exchange for the bonds of The Colorado Industrial Company guaranteed by The Colorado Fuel and Iron Company, in the ratio of $400.00 face value of new bonds and 20 shares of stock for each $1,000.00 face amount of Colorado Industrial Company bonds. Since the Industrial Company bonds were then in default on both principal and interest, such 552,660 shares issued to the holders of Industrial Bonds were the only shares of the new company to be presently issued. The new company was to give to the preferred and common stockholders of the old Colorado Fuel and Iron Company merely warrants to purchase certain specified amounts of stock of the new company at $35.00 per share on or before February 1, 1950, which option price was considerably higher than the opening market price for shares of the new

company. Three Hundred fifteen thousand, three hundred seventy-nine shares of stock of the new company were reserved for this purpose. Thus, the Plan provided that 1,000,000 shares of the new Company should be authorized. Of this number, 552,660 shares were to be issued to the holders of Industrial Bonds; 315,379 shares were to be reserved to apply against warrants, when, as and if the option were exercised; and the remaining 131,961 shares were reserved for corporate purposes.

7. In pursuance of the Plan of Reorganization and the Orders of April 25, 1936, the new company, The Colorado Fuel and Iron Corporation, was organized under the laws of the State of Colorado, and on June 20, 1936 the Court entered its Order approving the form of documents and directing the transfer of assets to, and the issuance of securities and assumption of liabilities by, the new company. A copy of this Order, marked "Exhibit I", is attached hereto and by this reference made a part hereof. It provided that on July 1, 1936, The Colorado Fuel and Iron Company, The Colorado Industrial Company, Arthur Roeder, Trustee of the assets of both, and The New York Trust Company, as Trustee under the Colorado Industrial Company mortgage, should convey to The Colorado Fuel and Iron Corporation all their right, title and interest in all of the assets of The Colorado Fuel and Iron Company and the Colorado Industrial Company. Simultaneously, or promptly thereafter, The Colorado Fuel and Iron Corporation was directed to deliver to, or on the order of, the Reorganization Managers $11,053,200.00 of its Income Bonds, 552,660 shares of its stock and warrants representing the right to purchase 315,379 shares of its stock. Simultaneously, or promptly thereafter, The New York Trust Company, as Trustee of this first mortgage of the Industrial Company, was directed to execute a satisfaction and discharge of the First Mortgage of the Industrial Company. As soon as reasonably practicable, the Reorganization Managers were directed to distribute to the holders of Industrial Bonds the new Income Bonds and all of the stock of the new company to be issued, and to distribute to the preferred and com-

mon stockholders of the old company warrants to purchase stock in accordance with the terms of the warrant agreement. A copy of said warrant agreement, marked "Exhibit J", is attached hereto and made a part hereof.

8. The Order further provided as follows (Ar. Two, Par. F, p. 7):

> "The provisions of this Order directing the transfer and delivery of the properties and assets of the Debtors to the New Company, the assumption by the New Company of certain obligations of the Debtors and of the Trustee as hereinabove and in Article Three hereof provided, and the issue by the New Company to or on the order of, and the distribution by, the Reorganization Managers of the New Securities, shall be a single and entire order and direction, notwithstanding the provisions hereof permitting the transfer of said properties and assets forthwith and without awaiting the assumption by the New Company of said liabilities or the issue, delivery and distribution of the New Securities."

Similarly it directed that any dividends or interest paid with respect to any of the new securities during the period when such new securities were held by the Reorganization Managers or distributing agents should be held by them and paid to the holders of the Industrial Bonds as soon as the physical exchange was effected.

9. Pursuant to Article Five of said Order of June 20th, the Reorganization Managers gave notice to the holders of Industrial Bonds that the new securities would be available for distribution on September 1, 1936. A copy of this notice, marked "Exhibit K", is attached hereto and by this reference made a part hereof. Thereafter, on September 10, 1936, the petitioner surrendered its $10,000.00 face amount of Colorado Industrial Company First Mortgage Five Per Cent. Bonds in exchange for $4,000.00 face amount of the Income Mortgage Bonds and 200 shares of the stock of The Colorado Fuel and Iron Corporation. At the same time and in due course the other holders of Industrial Bonds surrendered their certificates for cancellation in exchange for Income

Bonds and shares of stock in the new company upon the same basis as provided in the Plan.

10. Pursuant to the Order of June 20, 1936, the properties of The Colorado Fuel and Iron Company and the Colorado Industrial Company, and all the right, title and interest of the Trustees under the Industrial Company Mortgage were transferred to the new company as of July 1, 1936, as is recited in the final report of the Reorganization Trustee, dated September 12, 1938 and filed September 13, 1938. A copy of said conveyance, marked "Exhibit L", and an extract from said report, marked "Exhibit M", are attached hereto and by this reference made a part hereof. By June 30, 1938, $11,029,200.00 face value Income Bonds and 551,460 shares of stock in the new company had been distributed in exchange for Industrial Bonds pursuant to the Plan and the Order of April 25, 1936, leaving only $24,000.00 face value of Income Bonds and 1200 shares of stock still to be distributed. On the same date all but 1,714 shares of preferred stock in the old company, out of 20,000 shares, and all but 20,572 shares of common stock in the old company, out of 340,505 shares, had been exchanged for warrants. On the same date only 465 shares of stock in the new company had been issued for cash upon the exercise of the warrants; all as recited in Exhibit "M", the extract from the Final Report of the Trustee. The first exercise of the warrant options for purchase of stock in the new company occurred on October 23, 1936, and it was for 37 shares.

11. Immediately after the consummation of the plan of liquidation, 552,660 shares of stock of the new company were issued, and all of these shares belonged to the holders of Industrial Bonds in accordance with the provisions of the Plan and the order of April 25, 1936. No stock was issued to parties other than the Industrial bondholders until October 23, 1936, and by June 30, 1938 only 465 shares had been issued to other parties (the 465 shares referred to above as issued upon the exercise of warrants). The warrant agreement, Exhibit "J", provided, in Article Twelfth thereof, that the holders of warrants should not have the right to vote

or to receive notice as stockholders, nor should they have any rights whatsoever as stockholders.

12. On the date of exchange the fair market value of the securities received in exchange for Industrial Bonds was $79.00 for each $100.00 face amount of Income Bonds and $27.25 for each share of stock in the new company, a total of $8,610.00.

By Order of Court, dated October 12, 1938, and filed November 18, 1938, copy of which, marked "Exhibit "N", is attached hereto and by this reference made a part hereof, the reorganization proceedings were concluded and the Trustee discharged.

It is further stipulated and agreed that either party hereto may introduce such further and additional evidence, not inconsistent with the facts above stipulated, as may be material to any of the issues herein, and that the exhibits attached hereto and referred to herein may be given the same force and effect as if the same had been duly offered and received in evidence in open court.

Dated this 19th day of September, 1939.

QUIGG NEWTON, JR.,
Quigg Newton, Jr.,
RICHARD M. DAVIS,
Richard M. Davis,
Counsel for Petitioner.
J. P. WENCHEL,
J. P. Wenchel. RPH
Chief Counsel,
Bureau of Internal Revenue.

Filed Sep. 21, 1939. U. S. Board of Tax Appeals.

Supplemental Designation of Portions of Record to Be Contained in Record on Review.

To the Clerk of the United States Board of Tax Appeals:

In addition to the documents and records heretofore certified and transmitted by you to the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit in connection with the petition for review filed by the Commissioner of Internal

Revenue, in this proceeding, you will please prepare, transmit and deliver to the clerk of said Court one copy duly certified of each of the following:

1. Stipulation of facts, including list of exhibits attached hereto, and Exhibits A, B and C but omitting Exhibits D to N, inclusive,

2. This supplemental designation.

(Signed) J. P. WENCHEL, RLW
J. P. Wenchel, Chief Counsel,
Bureau of Internal Revenue.

Statement of Service:

A copy of this Supplemental Designation of portions of record to be contained in record on review was mailed to attorneys for respondent on review this date, March 19, 1941.

J. P. WENCHEL,
J. P. Wenchel, Chief Counsel,
Bureau of Internal Revenue.

Filed Mar. 19, 1941, United States Board of Tax Appeals.

[Clerk's Certificate.]

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 28, inclusive, contain and are a true copy of the supplemental transcript of record, papers, and proceedings on file and of record in my office as called for by the supplemental Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 20th day of March, 1941.

B. D. GAMBLE, Clerk,
United States Board
of Tax Appeals.

(Seal)

Filed March 26, 1941. Robert B. Cartwright, Clerk.

And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit, viz:

Motion

Now comes the Commissioner of Internal Revenue, by his attorney, Samuel O. Clark. Jr., Assistant Attorney General, and shows to the Court that the above entitled causes, being Board of Tax Appeals Docket Numbers 97325 and 97324, respectively, were consolidated for hearing and decision in the Board of Tax Appeals; that, under date of August 6, 1940, the Board of Tax Appeals promulgated one opinion in the two proceedings; that the two proceedings in this Court involve substantially identical facts and the issues of law therein are the same; that, while separate records are being printed in the two cases due to separate stipulations of facts before the Board, there has been designated for printing only in the Newton Trust case exhibits "A" to "N," inclusive, attached to the stipulation therein; that these exhibits are common to the two cases and were so considered by the Board of Tax Appeals in its decision.

Wherefore, counsel for the Commissioner of Internal Revenue moves the Court that the two above entitled causes be consolidated for purposes of briefing and argument in this Court and that the exhibits "A" to "N," inclusive, designated for printing in the Newton Trust case, be taken and considered for all purposes as forming a part of the printed record in the case of Commissioner v. James Q. Newton, Jr.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

Filed February 21, 1941, Robert B. Cartwright, Clerk.

Order

Thirty-ninth Day, January Term, Monday, April 7th A. D. 1941

Before Honorable ORIE L. PHILLIPS and Honorable ROBERT E. LEWIS, Circuit Judges

These causes came on to be heard on the motion of petitioner for the consolidation of the causes for the purpose of oral argument and were submitted to the court.

On consideration whereof, it is now here ordered by the court that said motion be and the same is hereby granted and that these

causes be and the same are hereby consolidated for the purpose of oral argument.

Order of submission

Thirty-sixth Day, April Term, Wednesday, June 25th A. D. 1941

Before Honorable ORIE L. PHILLIPS, Honorable WALTER A. HUXMAN and Honorable ALFRED P. MURRAH, Circuit Judges

This cause came on to be heard and was argued by counsel, Arthur A. Armstrong, Esquire, appearing for petitioner, Richard Davis, Esquire, appearing for respondent.

On motions, petitioner was granted leave to file a reply brief herein within ten days from this day and respondent was granted leave to file an answer thereto within ten days thereafter.

Thereupon, this cause was submitted to the court.

United States Circuit Court of Appeals, Tenth Circuit

Nos. 2267 and 2268. APRIL TERM, 1941

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JAMES Q. NEWTON, JR., RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JAMES Q. NEWTON TRUST, RESPONDENT

On Petitions to Review the Decisions of the United States Board of Tax Appeals

July 24, 1941

Arthur A. Armstrong, Sp. Asst. to the Atty. Gen. (Samuel O. Clark, Jr., Asst. Atty. Gen., and Sewall Key and Samuel H. Levy, Sp. Assts. to the Atty. Gen., were with him on the brief) for petitioner.

Richard M. Davis (Quigg Newton, Jr., and Newton, Davis and Drinkwater were with him on the brief) for respondent

Before PHILLIPS, HUXMAN, and MURRAH, Circuit Judges

PHILLIPS, Circuit Judge, delivered the opinion of the court

The ultimate questions here presented are identical with those considered by the court in Number 2270—Commissioner of Internal

Revenue v. Cement Investors, Inc., this day decided, the facts being substantially the same, except as to the amount of bonds involved and the cost thereof to the respective taxpayers.

Therefore, on authority of Commissioner of Internal Revenue v. Cement Investors, Inc., the orders of the Board of Tax Appeals are respectively Affirmed.

A true copy.

Attest:

Clerk U. S. Circuit Court of Appeals, Tenth Circuit.

Judgment

Forty-eighth Day, April Term, Thursday, July 24th A. D. 1941

Before Honorable ORIE L. PHILLIPS, Circuit Judge, and Honorable J. FOSTER SYMES, District Judge

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the decision of the said United States Board of Tax Appeals be and the same is hereby affirmed.

On August 30, 1941, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States Board of Tax Appeals.

Clerk's certificate

United States Circuit Court of Appeals, Tenth Circuit:

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify that the foregoing contains a full, true, and complete copy of the transcript of the record from the United States Board of Tax Appeals, and full, true, and complete copies of certain pleadings, record entries, and proceedings, including the opinion (except full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said United States Circuit Court of Appeals, No. 2267, wherein Commissioner of Internal Revenue was petitioned and James Q. Newton, Jr., was respondent, as full, true, and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the

Tenth Circuit, at my office in Denver, Colorado, this 9th day of September A. D. 1941.

[SEAL]

ROBERT B. CARTWRIGHT,
Clerk of the United States Circuit Court of Appeals, Tenth Circuit.
By GEORGE A. PEASE,
Deputy Clerk.

Clerk's certificate

United States Circuit Court of Appeals, Tenth Circuit:

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify that the foregoing contains a full, true, and complete copy of the transcript of the record from the United States Board of Tax Appeals, and full, true, and complete copies of certain pleadings, record entries, and proceedings, including the opinion (except full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said United States Circuit Court of Appeals, No. 2268, wherein Commissioner of Internal Revenue was petitioner and James Q. Newton Trust was respondent, as full, true, and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 9th day of September A. D. 1941.

[SEAL]

ROBERT B. CARTWRIGHT,
Clerk of the United States Circuit Court of Appeals, Tenth Circuit.

By GEORGE A. PEASE,
Deputy Clerk.

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Supreme Court of the United States

No. 646 —, October Term, 1941

Order allowing certiorari

March 9, 1942

On petition for writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

A petition for rehearing having been filed in this case upon the denial of a petition for writ of certiorari;

Upon consideration thereof, it is ordered by this Court that the said petition be, and the same is hereby, granted.

And it is further ordered that the order denying certiorari be, and the same is, hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1942

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